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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1532

JERRY ALLEN PENNER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MARVIN M. KARPATKIN
MICHAEL N. POLLET
KARPATKIN, OHRENSTEIN & KARPATKIN
1345 Avenue of the Americas
New York, New York 10019
Attorneys for Petitioner

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on March 6, 1970.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Tenth Circuit, filed January 29, 1970, is not yet reported and is printed at PA1-PA7.* There was no opinion by the United States District Court for the Western District of Oklahoma.

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* "PA" refers to the Appendix to this petition.

Jurisdiction

The judgment of the United States Court of Appeals was entered on March 6, 1970, on which date such Court entered its order denying a petition for rehearing which had been timely filed, following its January 19, 1970 opinion which affirmed petitioner's conviction in the United States District Court for the Western District of Oklahoma. On March 30, 1970, Mr. Justice White issued an order extending the time within which to file this petition for writ of certiorari up to and including May 5, 1970. The jurisdiction of this Court is invoked under 28 USC 1254(1).

Questions Presented for Review

1. Whether the doctrine of "appellate cure" in selective service administrative practice, adopted by the Court of Appeals for the Tenth Circuit in this case, is legally correct in the light of the fact that contrary doctrines have been adopted by the Second, Third, Fourth, Sixth and Ninth Circuits and by a number of District Courts.

2. Whether the erroneous failure by a local board to consider a claim of conscientious objection is automatically cured by virtue of consideration of petitioner's case by one or more selective service appeal boards.

3. Whether the doctrine of "appellate cure" in selective service administrative practice can ever be operative when no reasons are set forth by the appeal board for its action.

4. Whether petitioner's local board was unlawfully derelict in the performance of its duty by failing to exercise its

obligation to classify petitioner on the merits of his individual case, on the assumption that petitioner would be subject to further classification by the Oklahoma State Appeals Board

5. Whether petitioner's selective service local board engaged in unlawful religious discrimination against petitioner, a third generation Mennonite, by refusing to classify him I-O as a conscientious objector to participation in war in any form, including noncombatant training and service, and insisted on classifying him I-A-O as a conscientious objector only to combatant training and service, on the basis of its unconstitutional, illegal and discriminatory view that either all or most Mennonites should be so classified.

6. Whether a conscientious objector who meets the religious training and belief requirements of the statute, can be denied classification as such on the basis of evidence of asserted youthful misbehavior.

7. Whether petitioner's order to report for induction was invalid either as a matter of law or because it was without any rational basis in fact.

Constitutional Provisions, Statutes and Regulations Involved

This case involves the religious liberty clause of the First Amendment and the due process clause of the Fifth Amendment to the United States Constitution.

Also involved are the following provisions of the former Universal Military Training and Service Act of 1950, see Title 50 USC, Appendix, Sections 451 et seq.:

Section 6(j), former 50 App. USC, §456(j):*

> "(j) Nothing contained in this title [sections 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be assigned to non-combatant service as defined by the President, or

* The Military Selective Service Act of 1967, 81 Stat. 100 et seq., made certain changes in the processing of conscientious objector claims, including, principally, elimination of Department of Justice inquiry and hearing.

shall, if he is found to be conscientiously opposed to participation in such non-combatant service, in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate. . . . Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance

of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix]. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."

Section 10(b)(3), 50 App. USC, §460(b)(3):

"(b) *Officials, employees, and boards; Printing; Paroles; Leases.*—The President is authorized—. . . (3) to create and establish within the Selective Service System civilian local boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the registration, examination, classification, selection, assignment, delivery for induction, and maintenance of records of persons registered under this title, together with such other duties as may be assigned under this title; . . . . Such local

boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title, of all individuals within the jurisdiction of such local boards. The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe."

Certain provisions of the Selective Service Regulations, Title 32 CFR, are likewise involved:

Section 1600.735-1:

"*Conduct Requirements in General.*—

(c) Employees shall observe the applicable laws and regulations governing participation in political activities; avoid any discrimination because of race, color, religion, national origin, or sex; . . . ."

Section 1604.6:

"1604.6 *National Selective Service Appeal Board.*— (a) There is hereby created and established within the Selective Service System a civilian agency of appeal which shall be known as the National Selective Service Appeal Board, hereafter in this section referred to as the National Board. The National Board shall consist of three members who shall be appointed by the Presi-

dent from among citizens of the United States who are not members of the armed forces, one of whom shall be designated by the President as the Chairman.

(b) The National Board is authorized and directed to perform all the functions and duties vested in the President by that sentence of section 10 (b) (3) of the Military Selective Service Act of 1967, which reads as follows: 'The President upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title, and the determination of the President shall be final.'"

Section 1604.24:

"1604.24 *Jurisdiction.*—The appeal board shall have jurisdiction to review and to affirm or change any decision appealed to it from any local board in its area or any decision appealed from any local board not in its area when such appeal is either transferred to it in the manner provided in these regulations, or is appealed to it by or on behalf of any registrant whose principal place of employment is located in its area or submitted to it in the manner required by law."

Section 1604.54:

"1604.54 *Jurisdiction.*—The jurisdiction of each local board shall extend to all persons registered in, or subject to registration in, the area for which it was appointed. It shall have full authority to do and perform all acts within its jurisdiction authorized by the selective service law."

Section 1621.14:

"1621.14 *Securing information from welfare and governmental agencies.*

(a) The local board is authorized to request and receive information from local welfare and governmental agencies whenever such information will assist it in determining the proper classification of a registrant.

(b) The local board is authorized to request the State Director of Selective Service to secure information from State or national welfare and governmental agencies when such information will assist it in determining the proper classification of a registrant."

Section 1621.15:

"1621.15 *Subpena Power of Local Board.*—To the extent necessary for carrying out its function, the local board shall have authority (a) to subpena any person to appear before it, (b) to direct such person to produce such papers and records as may be deemed necessary, and (c) to require him to testify, under oath, in regard to any pertinent matter within his knowledge. It shall be the duty of any person subpenaed to appear, to produce the papers and records described in the subpena, and to testify."

Section 1622.1(c):

"1622.1 *General Principles of Classification.*—

(c) It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant will be considered as available for military service until his eligibility for

deferment or exemption from military service is clearly established to the satisfaction of the local board. The local board will receive and consider all information, pertinent to the classification of a registrant, presented to it."

Section 1622.1(d):

"1622.1 *General Principles of Classification.*—

(d) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious or other organization. Each such registrant shall receive equal justice."

Section 1622.11:

"1622.11 *Class I-A-O: Conscientious Objector Available for Noncombatant Military Service Only.*—In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces."

Section 1622.14:

"1622.14 *Class I-O: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest.*—In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and

belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

Section 1626.24:

"1626.24 *Review by Appeal Board.*—(a) The appeal board shall consider appeals in the order in which they are received unless otherwise directed by the Director of Selective Service, in which event, they shall be considered in such order as the Director of Selective Service shall prescribe.

(b) In reviewing the appeal and classifying the registrant, the appeal board shall not receive or consider any information other than the following:

(1) Information contained in the record received from the local board.

(2) General information concerning economic, industrial, and social conditions."

Statement of the Case

Petitioner, a third generation Mennonite (PA3), and a second generation conscientious objector,[1] has been sentenced to five years in jail because the Selective Service System refused to recognize his claim of conscientious objection, and the District Court and the Court of Appeals

[1] Petitioner was born in Staunton, Virginia, while his father and mother were residing at a conscientious objector public service camp during World War II. Transcript of Proceedings in District Court, Volume IV of Record on Appeal, page 49, hereinafter "Tr. ."

found no legal impediment in the selective service processing. The principal holding of the courts was that the various errors committed were excused by operation of the doctrine of appellate cure. See Point I, *infra*.

Petitioner, who lives on a farm with his family in Balko, Beaver County, Oklahoma, claimed conscientious objector status upon registration with his local board at age 18. He was initially classified 1-A-O (conscientious objector to combatant training and service, but available for noncombatant training and service) without any statement of reasons for refusing him his requested classification as 1-O (conscientious objector to all military training and service, noncombatant and combatant, but available for civilian alternative service). The United States Attorney conceded at the trial in the District Court that the 1-A-O classification was clearly erroneous, since there was no basis in fact for denial of the 1-O classification. Tr. 60, 61, 64, 75. This admission was acknowledged by the trial court. Tr. 64.

The Clerk of the Local Board admitted that the registrant met all of the religious qualifications and requirements for 1-O classification, Tr. 18, and testified that the Board gave petitioner a 1-A-O classification pursuant to a "policy" of so classifying either Mennonites generally, Tr. 16-17, or "approximately" all, Tr. 17, or a "majority" of Mennonites, Tr. 17, because of some notion that the local board "had no means of investigation and they felt that the State should make that decision."[1] Tr. 18.

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[1] Tr. 38-39.

[2] This is erroneous and directly contrary to the regulations. It is the Local Board which has subpoena and investigatory power. 32

The full statement of this admission occurred in the course of the following colloquy between the Court, counsel for defendant, and the Clerk of the Local Board, concerning the propriety of such testimony, and resulting in its admission as an offer of proof:

"The Court: No, if you want to make an offer of proof as to what her answer would be to that question, you make your offer now, if you know what her answer is, you can put it in the record as to—

"Mr. Moran: As I understand the answer to the question, the policy towards the Mennonite boys, when their application or classifications were considered by the Board, that they were given 1-A-O, with the understanding that they could appeal and that the State Headquarters could then make whatever investigation was necessary to determine the real classification for the . . . the Mennonites; isn't that correct?

"A. Approximately.

"*By Mr. Moran*:

"Q. And we make that offer of proof.

"The Court: Will this be your answer to this question, if the court permitted you to answer?

"A. I would like to have that stated a little bit clearer. What was your question, exactly?

CFR Sections 1621.14, 1621.15, while the Appeal Board is barred from receiving or considering "any information other than . . . (1) Information contained in the record received from the local board . . . [and] (2) General information concerning economic, industrial and social conditions." 32 CFR Section 1626.24

"The Court: The question, in substance, is: The policy of the Board to give the 1-A-O to all Mennonite applicants.

"A. No, not exactly. Not all. Majority, yes.

"*By Mr. Moran:*

"Q. With regard to this particular case, Mrs. Hawes, were you present when this applicant was considered by the Board. A. Undoubtedly I was.

"Q. And isn't it true, in this particular case, that Jerry Allen Penner . . . his case . . . that the Board felt that the 1-O classification could best be obtained at the State level, and that they gave him the 1-A-O he could appeal it? A. Yes, they had no means of investigation and they felt that the State should make that decision.

"Q. Now, insofar as any forms required to properly inform the Board of the religious beliefs of this Defendant, were all of those forms filled out? A. There was sufficient evidence, I think, to establish his religious belief, but the Board had no means of knowing whether or not that was a sincere belief.

"Q. But, from the standpoint of the Local Draft Board and your examination of that file, there was never any information requested of this defendant, Jerry Allen Penner, that was not supplied by Jerry Allen Penner? A. That is right.

"Q. And if the Draft Board . . . there is no records that you have there which reflect that the Draft Board of Beaver County requested additional information from Mr. Penner? A. No, sir." (Tr. 16-18)[1]

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[1] The Court of Appeals summarizes this offer of proof as "to the effect that the majority of Mennonites were classified as 1-A-O and

The I-A-O classification was continued by the Oklahoma State Appeal Board, again without any statement of reasons. The National Selective Service Appeal Board (also called the Presidential Appeal Board) reclassified petitioner I-A, likewise without statement of reasons.[5] It was the Presidential Appeal Board's I-A classification which led to petitioner's induction order, his refusal on grounds of conscience to submit to induction, and his subsequent indictment, prosecution and conviction.[6]

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that the State Board was better equipped on an appeal to make an investigation." (PA4.) It is respectfully submitted that the actual testimony reveals much more than the statistical abstract stated by the Court below. The Clerk of the Local Board responded affirmatively to both counsel's and the Court's questions that the virtually universal practice of granting I-A-O to Mennonite applicants was the "policy of the board." Tr. 17, Tr. 16.

[5] Although the regulations do not require any statement of reasons, several courts have held that a failure to state reasons is a denial of due process. *See United States* v. *St. Clair*, 293 F. Supp. 337 (E.D.N.Y. 1968); *United States* v. *James*, 417 F.2d 826 (4th Cir. 1969); *United States* v. *Broyles*, —— F.2d ——, 38 U.S. Law Week 2551 (4th Cir. March 19, 1970) (*en banc*).

[6] The Presidential appeal, which cannot be taken by a registrant unless there is a dissenting vote on the state appeal board, 32 CFR §1627.3, was taken by the National Director of Selective Service on March 15, 1967. Record on Appeal, Volume I, p. 27. On Feb. 8, 1967, Oklahoma State Headquarters sent the registrant's file to National Headquarters "as per the request contained in your recent letter . . . ." stating further that "this Headquarters contemplates no further action in this case." Appeal Record, Volume I, p. 23. The Appeal Record contains the entire selective service file, having been put in evidence by the Government as Exhibit "A," Tr. 9, but does not contain a copy of the "recent letter" from National Headquarters to Oklahoma State Headquarters. It is a clear violation of the regulations to remove any documents from a registrant's selective service file. 32 CFR §1606.21(b). There is no indication anywhere in petitioner's file as to why the National Director took the Presidential Appeal which led to registrant's I-A classification.

The courts below held that petitioner's 1-A classification by the Presidential Appeal Board was nevertheless justified by material which became part of petitioner's selective service file subsequent to his appearance before the Local Board, specifically the résumé of the FBI inquiry and the advisory recommendation of the Department of Justice,[7] the latter based on a report by a hearing officer.[8] The recommendation (pp. 8-12) contained references to petitioner's personal behavior which the Court of Appeals characterized as "derogatory and . . . departures by him in his personal behavior from the Mennonite teachings." (PA3.) "The résumé stated that while at Tabor College, the appellant on weekends would drink, date girls, and sometimes spend the night with them." (PA3.) The Court of Appeals also noted that "Some, but not all, of the persons interviewed during the FBI investigation stated in effect that in their opinion appellant was not sincere in his religious beliefs." (PA3.) The FBI résumé, Appeal Record I, p. 15 et seq., does not contain the names and addresses of the persons interviewed, and in virtually every instance where an opinion of insincerity is reported, this opinion is either unsupported or is supported only by statements that petitioner occasionally drank beer, smoked or caroused with girls.

The Department of Justice hearing officer, the only official in the entire appellate process who actually saw, heard

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[7] Until the effective date of the June 30, 1967, amendments to the Universal Military Training and Service Act of 1950, §6(j) of the Act provided for Department of Justice inquiry and hearing for every conscientious objector claimant. See pp. 4-5 *supra*.

[8] Petitioner was never furnished with a copy of the hearing officer's report, although duly demanded by counsel. Tr. 10-11. *See United States* v. *Purvis*, 403 F.2d 555 (2d Cir. 1968); *United States* v. *Hesse*, 417 F.2d 141, 146, n. 10 (8th Cir. 1969).

and questioned the registrant,[9] found that registrant was sincere in his conscientious objection to combatant service, but nevertheless recommended that registrant be continued in I-A-O classification because it was his view that registrant's objection to noncombatant service was not sincere. (PA10; PA11; PA12.) The Department of Justice joined in the I-A-O recommendation, which was accepted by the State Appeal Board, but not by the Presidential Appeal Board.

A review of the Department of Justice recommendation indicates that the hearing officer and the Chief of the Conscientious Objector Section of the Department of Justice relied on the following items in recommending against I-O classification for petitioner: "smoking, drinking and running around"; irregular church attendance and disciplinary problems at school; assistance by the dean of his college in filling out his conscientious objector form;[10] inability to explain his church's affiliation with other Mennonite groups, lack of specific knowledge of Mennonite practices and liturgy, and lack of "overall conception" of the teachings and practices of his church; the hearing officer's opinion that the registrant's "views might change if associated with other young men in the military, away from his parents." (PA10-11.)

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[9] Despite intimations to the contrary in the opinion of the Court of Appeals, there was no "hearing on his appeal to the State Appeals Board," (PA 3), or to the Presidential Appeal Board. (PA7.) Neither the registrant nor counsel are permitted to appear before any appeal board.

[10] This was denied by petitioner. "I stated that the conscientious objector form was *not* filled out by the Dean of Men at Tabor College. I had asked the Dean to explain two or three questions on the form which I didn't fully understand." Letter to Appeal Board December 10, 1966, Appeal Record I, p. 18.

For the reasons set forth in Point III, *infra*, none of these reasons provided a lawful basis in fact for denying the registrant's classification. The hearing officer's recommendation is particularly erroneous in the light of his opinion that the registrant "was sincere with respect to his belief that under no circumstances could he violate God's law by killing another human being." (PA10.)

On December 10, 1966, after receiving a copy of the Department of Justice advisory recommendation, petitioner wrote a letter to the Appeal Board disagreeing with the recommendation and reiterating his appeal for a 1-O classification as a conscientious objector "because I cannot enter the armed forces (combatant or noncombatant) with a clear conscience, even if it means going to jail." Appeal Record I, p. 18. With respect to registrant's imperfections, petitioner wrote:

> "The hearing officer leaves the impression that in order to be a conscientious objector a person must be perfect and never make mistakes. There is no such human being. I am a conscientious objector and I have temptations and make mistakes just like anyone else. But I thank God that as a Christian I can ask Him for forgiveness and to help me not to make them again." Appeal Record I, p. 18.

After the Presidential Appeal Board had acted, petitioner requested reopening of his classification, which was denied;[11] the induction order, the induction refusal, and the prosecution and conviction followed.

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[11] On July 17, 1967, the Clerk of the Local Board sent petitioner a letter denying his request for reopening. Appeal Record I, p. 33.

Reasons for Granting the Writ

Certiorari should be granted because the decision of the Court of Appeals gives Selective Service local boards carte blanche to violate the United States Constitution, federal laws and the Selective Service Act and the Selective Service Regulations themselves by failing to consider a claim presented by a registrant on the dubious theory that any dereliction of law by the local board—no matter how fundamental and no matter how gross the dereliction—is cured by the review of appeal boards within the Selective Service System. This Court should definitively rule upon the validity of the doctrine of appellate cure, an issue which is still unsettled by this Court. The decision of the Court of Appeals for the Tenth Circuit is in sharp conflict with decisions of the Second, Third, Fourth, Sixth and Ninth Circuits and several district courts, and is contrary to principles enunciated by this Court. Certiorari likewise should be granted because the Court of Appeals has decided other important questions of selective service law which have not been, but should be, settled by this Court.

I.

The Court of Appeals held that even if the failure of the local board to consider the petitioner's request for 1-O classification was legally erroneous, that such error was cured

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Once again, the Local Board violated applicable selective service regulations, since there is no entry on the minutes of Local Board action of the purported denial of reopening, and no indication that the matter was considered by and voted upon by the Board. See 32 CFR §1625.14. See also *Murray* v. *Blatchford*, 307 F. Supp. 1038 (D.R.I. 1969); *United States* v. *Prescott*, 301 F. Supp. 1116 (D.N.H. 1969); *United States* v. *Walsh*, 279 F. Supp. 115 (D. Mass. 1968).

by the review of the petitioner's case by the Oklahoma Selective Service Appeal Board and by the Presidential Appeal Board.

The application of the doctrine of appellate cure by the Court of Appeals in this case is in conflict with applicable decisions of this Court. This Court has held that where the registrant's Selective Service record does not exclude the possibility that an appeal board based its decision upon an erroneous determination of law, the classification cannot stand. *United States* v. *Seeger*, 380 U.S. 163 (1965); *Sicurella* v. *United States*, 348 U.S. 385 (1955). Since neither the Oklahoma State Appeal Board nor the Presidential Appeal Board stated any reasons for their decisions and there is no indication that either appeal board made any independent classification unaffected by the local board's improper interpretation, *a fortiori*, the classification cannot be sustained in accordance with the holdings of this Court in *Seeger* and *Sicurella*.

In adopting the doctrine of appellate cure, the Court of Appeals specifically rejected the contrary ruling of the Ninth Circuit in *United States* v. *Knox*, 200 F.2d 398 (9th Cir. 1952). At the same time the Court of Appeals failed to recognize that there were important decisions in several other circuit and district courts which had also rejected the doctrine of appellate cure.

The Court of Appeals for the Second Circuit has ruled that a Selective Service registrant is entitled to a full and fair disposition of his contentions at every level of operations of the Selective Service system and that a review by an appeal board may not serve to supply a deficiency in a fair hearing by the local board. See *Mintz* v. *Houlett*, 207

F.2d 758 (2nd Cir. 1953); *United States* v. *Fry*, 203 F.2d 638 (2d Cir. 1953); but see *United States* v. *Corliss*, 280 F.2d 808 (2d Cir. 1960), cert. denied 364 U.S. 884 (1960) (claim of procedural unfairness but not failure to consider on merits). Similarly, the Court of Appeals for the Third Circuit has held in like circumstances that where no reasons are given by the appeal board for its determination, it cannot be assumed that the application of an erroneous standard by the local board was cured. *See United States* v. *Stepler*, 258 F.2d 310 (3rd Cir. 1958); *United States* v. *Stiles*, 169 F.2d 455 (3rd Cir. 1948); *United States* v. *Carroll*, 398 F.2d 651 (3rd Cir. 1968). The Sixth Circuit, as well as the Second and Third Circuits, has also held that the doctrine of appellate cure is not an inflexible dogma to be applied to deprive registrants of vital and fundamental rights. See *Niznik* v. *United States*, 184 F.2d 972 (6th Cir. 1950); *United States* v. *Tichenor*, 403 F.2d 986 (6th Cir. 1968); *Davis* v. *United States*, 199 F.2d 689 (6th Cir. 1952). The Fourth Circuit too has apparently refused to apply this doctrine of appellate cure in the case of *United States* v. *James*, 417 F.2d 826 (4th Cir. 1969).

The decisions of the Second, Third, Fourth and Sixth Circuits rejecting the doctrine of appellate cure as ill-conceived are joined in by the decisions of the Ninth Circuit. The court below specifically rejected the holding of the Ninth Circuit in the case of *Knox* v. *United States*, *supra*. The Ninth Circuit has reiterated its rejection of appellate cure in the cases of *United States* v. *Atherton*, —— F.2d ——, 2 SSLR 3334, No. 23406 (9th Cir. Oct. 9, 1969) and *United States* v. *Haughton*, 413 F.2d 736 (9th Cir. 1969); see also *Shepherd* v. *United States*, 217 F.2d 942 (9th Cir. 1954); *Franks* v. *United States*, 216 F.2d 266 (9th Cir.

1954);[12] *Welsh* v. *United States*, 404 F.2d 1078, 1083 (9th Cir. 1968), cert. granted, 396 U.S. 816 (1969).

Several district courts have also explicitly refused to apply the appellate cure doctrine. See: *United States* v. *Balderrama*, 304 F. Supp. 822 (W.D. Tex. 1969); *United States* v. *Harahush*, —— F. Supp. ——, 2 SSLR 3501, Crim. No. 22994 (E.D. Pa. Nov. 24, 1969); *United States* v. *Prescott*, 301 F. Supp. 1116 (D.N.H. 1969); *United States* v. *Hauley*, —— F. Supp. ——, 2 SSLR 3113, No. 4-69 Cr. 8 (D.Minn. May 26, 1969); *United States* v. *St. Clair*, 293 F. Supp. 337 (E.D.N.Y. 1968).

Several of the other Courts of Appeals which have considered the doctrine of appellate cure have held in accord with the decision of the Tenth Circuit in this case. The Eighth Circuit has applied the doctrine of appellate cure in the cases of *Vaughn* v. *United States*, 404 F.2d 586 (8th Cir. 1968) and *DeRemer* v. *United States*, 349 F.2d 712 (8th Cir. 1965). The Fifth Circuit has applied this doctrine in *Clay* v. *United States*, 397 F.2d 901 (5th Cir. 1968) and the First Circuit in *Suaczyk* v. *United States*, 156 F.2d 17 (1st Cir. 1946); cert. denied 67 Sup. Ct. 77 (1946). As the

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[12] The rationale of the Ninth Circuit in the *Franks* case is so pertinent as to warrant the following quotation in extenso:

> "In White v. United States, 9 Cir., 215 F.2d 782, we pointed out the fact that in consideration of a claim of conscientious objection and of the question whether a registrant should be so classified, the personal appearance of the registrant before the local board is of major and commanding importance. The appeal board, notwithstanding it has the aid of a written report from a hearing officer, has no similar opportunity to judge of the genuineness, the sincerity and the extent of a registrant's conscientious objection to military service. Therefore a registrant who fails to have a fair chance for his proper classification on his appearance before the local board has been denied something which cannot be cured through the action of the appeal board." 216 F.2d at 270.

Tenth Circuit noted, the Court of Appeals for the Seventh Circuit has applied the doctrine of appellate cure in *United States* v. *Chodorski*, 240 F.2d 590 (7th Cir. 1957). But see *United States* v. *Peebles*, 220 F.2d 114 (7th Cir. 1955).

Since the conflict between the circuits is so pervasive,[12] and since the issue is one of vital importance affecting fundamental rights, this Court should grant *certiorari*, and settle this division by upholding the above cited decisions from the Second, Third, Fourth, Sixth and Ninth Circuits. Petitioner respectfully urges that the doctrine of appellate cure, as applied in this case, is a pernicious, judge-made rule[13] which purposefully seeks to avoid meaningful judicial review of any and all Selective Service derelictions and which sanctions free-wheeling, lawless action by local boards in flagrant disregard of due process rights. The true nature of appellate review within the Selective Service System was pointed out with great clarity by Judge Bownes of the District Court of New Hampshire in the case of *United States* v. *Prescott*, 301 F. Supp. 1116 (D. N.H. 1969):

> "It is sheer sophistry to argue that the review by the appeal board is a *de novo* hearing in the accepted sense. The registrant has no opportunity to personally

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[12] The ten Circuit Courts considering the doctrine of appellate cure appear to be equally divided. The Second, Third, Fourth, Sixth and Ninth Circuits appear to reject the doctrine of appellate cure while the First, Fifth, Seventh, Eighth and Tenth hold said doctrine to be in effect.

[13] Nothing in the statute or the regulations authorizes a doctrine of appellate cure in Selective Service administrative proceedings. This judge-made rule has even less legitimacy than the rule of exhaustion of administrative remedies which this Court severely restricted in *McKart* v. *United States*, 395 U.S. 185 (1969); see *McNeil* v. *United States*, 395 U.S. 463 (1969).

> appear and present his views. All the appeal board does is review the registrant's Selective Service file. If that file reveals, as it does in this case, errors of law, the act of review alone does not cure those errors. Under the circumstances of this case, i.e., an apparent and clear error in law applied initially by the local board, and no reason is stated by the appeal board for its decision, I am of the opinion that review by the District Court is not only allowed but is imperative to determine if the registrant was afforded due process of law."

301 F. Supp. at 1120.

Since the basic error of the local board in refusing to consider the merits of petitioner's claim to a 1-O classification was not revealed until the trial, after the petitioner had exhausted all of his administrative remedies, and therefore could not be disclosed by the appeals, there can be no appellate cure. See Feinberg, J., dissenting in *United States v. McGee*, —— F.2d ——, Docket No. 33568 (2d Cir., March 31, 1970).

As utilized by the Court of Appeals for the Tenth Circuit in this case, the doctrine of appellate cure amounts to the judicial pardon of Selective Service violations of a registrant's most fundamental rights. In effect, the Tenth Circuit is saying that Selective Service local boards can do what they will with registrants in violation of any and all of his due process rights so long as his file is forwarded to the Appeal Board, even through the decision by the appeal board is made in secret without any reasons being given, in the absence of the registrants or their counsel. This Court should reject such an atavistic doctrine in an

area of vital concern wherein the registrant's personal liberty and life may very well be at stake.

II.

The Court of Appeals held that the local board did not violate the petitioner's procedural or substantive due process rights by classifying him 1-A-O on the basis of the blanket characterization that a majority of Mennonites were classified 1-A-O.[*] Likewise, the Court of Appeals held that it was proper for the local board not to give any consideration whatsoever to the registrant's request for 1-O status because in the view of the local board it had no means of investigation[**] and felt that the State Appeal Board should decide the petitioner's eligibility for 1-O status. Thus, the decision below has approved of the local board's action which was tantamount to an outright denial of a meaningful personal appearance.

This decision of the Court of Appeals is contrary to the universally held requirement that a Selective Service local board cannot abdicate its duty of classifying each case on

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[*] In point of fact, of those Mennonites who are conscientious objectors, 80% are classified 1-O and 10% are classified 1-A-O according to information supplied by the Mennonite Central Committee.

[**] The statement by the local board secretary that the local board lacked means of investigating the registrant's 1-O claim is of course clearly erroneous. As this Court noted in *In re Jones v. United States*, 326 F. 2d 249, 256 (1964):

> "The local board may question a registrant under oath and subpoena witnesses to testify and to confer with registrant and witnesses to produce documents. 32 C.F.R. §1624.1. The board is authorized to obtain information from local, state and national welfare and governmental agencies. 32 C.F.R. §1624.4."

See also *United States v. Kroncke*, 459 F. 2d 697, 699 (8th Cir. 1972); *Jones v. Secretary of the Army*, 462 F. 2d 913, 916 (9th Cir. 1972); *Application of Agosto*, 285 F. 2d 400, 404 (2d Cir. 1961).

its individual merits. Each classification must be determined on its particular facts and not on the basis of any generalization. See *Application of Kanas*, 385 F.2d 506 (2d Cir. 1967); *United States v. Hestad*, 248 F. Supp. 650 (W.D. Wisc. 1965); *Striker v. Resor*, 283 F. Supp. 923 (D. N.J. 1968); *United States v. Singleton*, 282 F. Supp. 762 (S.D.N.Y. 1968); *United States v. Tschenor*, 403 F.2d 986 (6th Cir. 1968); *Robertson v. United States*, 404 F.2d 1141 (5th Cir. 1968); *Welsh v. United States*, 404 F.2d 1078 (9th Cir. 1968), cert. granted 396 U.S. 816 (1969).

Clearly, the failure of the local board to consider the petitioner's request for 1-O status violated his procedural and substantive due process rights. Classification by the local board is an indispensable step in the process of induction. It was the only occasion at which the petitioner had the opportunity to appear personally before those judging him. The petitioner was entitled to have his claims considered and acted upon by the local board, the membership of which is composed of residents of his own community. See *Knox v. United States*, 390 F.2d 398 (9th Cir. 1968); *Benitez-Manriquez v. Michels*, 305 F. Supp. 334 (D.P.R. 1969). Indeed, this violation of the registrant's rights could not be cured by the presence of an independent basis in fact for his classification, if such a basis were to exist. *Miller v. United States*, 388 F.2d 973 (9th Cir. 1967); *Owens v. United States*, 396 F.2d 540 (10th Cir. 1968), cert. den'd 89 Sup. Ct. 288 (1968); *United States v. Mendoza*, 296 F. Supp. 673 (E.D.N.Y. 1969).

Furthermore, as was demonstrated in the preceding section of this petition, subsequent review by appeal boards within the Selective Service System cannot and should not be sufficient to cure the error of the local board.

Finally, the action of the local board constitutes unlawful religious discrimination against petitioner. To classify a registrant I-A-O solely because the local board speculates that a majority of Mennonites are I-A-O's constitutes a violation of the First Amendment and the anti-discrimination provisions of the statute and the regulations. See *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Everson* v. *Board of Education*, 330 U.S. 1 (1947); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968); *United States* v. *Wingfield*, —— F. Supp. ——, 2 SSLR 3483, No. 43966 ACW (N.D.Cal. Jan. 7, 1970) (denial of registrant's conscientious objector claim because of civil rights activities); *Oesterreich* v. *Selective Service*, 393 U.S. 233 (1968); *Clark* v. *Gabriel*, 393 U.S. 256 (1968) (Douglas, J., concurring); *United States* v. *McFadden*, —— F. Supp. ——, 2 SSLR 3472, No. CR 69 152SJZ (N.D. Calif., February 19, 1970); *United States* v. *Bowen*, —— F. Supp. ——, 2 SSLR 3421 (N.D. Calif. December 24, 1969). As the United States Court of Appeals for the 3rd Circuit stated in the case of *United States* v. *Stalter*, 151 F.2d 633 (7th Cir. 1945):

> "Every registrant whether he be a [Mennonite] or otherwise is entitled to have his status determined according to the facts of his individual case."

151 F.2d at 638.

The failure of the local board to do so here constituted improper religious discrimination in violation of the First Amendment.

This Court should grant certiorari and reverse the Court of Appeals' decision permitting the discriminatory denial of conscientious-objector status without consideration of the merits of the claim by the local board.

III.

The court below erroneously approved administrative action which unlawfully denied petitioner conscientious objector classification because of a view that his "personal behavior," PA3, was a departure from the expected norm. No authority is cited for the proposition that a registrant's youthful derelictions provide a basis in fact for denial of conscientious objector status where his sincere religious objection to war and killing is established. It is surprising that the court below did not seek to distinguish its own prior holding in *Rempel* v. *United States*, 220 F.2d 949, 951-952 (10th Cir. 1955), which ruled in the case of a Mennonite claimant, that a collection of incidents of "derelictions while a youth attending school", disciplinary problems, disobedience to teachers, avoidance of school duties, convictions for disturbance of the peace and speeding, and the taking of animal life, are of "no persuasive significance in respect to his good faith or the lack of it in urging exemption from military service." *Id.* at 951.

Decisions of other courts of appeals which have considered the possible impact of youthful misbehavior on the bona fides of a conscientious objector claim have ruled even more strongly against the imposition of anachronistic, fundamentalist or Victorian standards of personal behavior. In *Chernekoff* v. *United States*, 219 F.2d 721, 724 (9th Cir. 1955), the court ruled irrelevant a conviction for drunkenness. In *United States* v. *Hesse*, 417 F.2d 141, 145-146 (8th Cir. 1969), the court similarly repudiated as a justification for denial, evidence that the registrant did not give up tobacco until two weeks before his hearing, had not attended church regularly, and could not answer all

of the hearing officer's questions about church doctrines. "To hold sincere religious conviction, one does not have to be a theologian." *Id.* at 146. And in *Parr* v. *United States*, 272 F.2d 416 (9th Cir. 1959), the court found insufficient a statement by an official of the registrant's church that he failed to live up to the church's expected standards of Bible study, had insufficient religious knowledge, and was "spiritually sick and a playboy." *Id.* at 420.[11] Cf. *United States* v. *Bouziden*, 108 F. Supp. 395, 398 (W.D. Okla. 1952), where the hearing officer referred to the registrant's "activities with the wife of a soldier who was then fighting in Korea" and operation of a cafe as somehow not entitling him to conscientious objector exemption, but the court was most unimpressed.

All of these decisions are in accord with the doctrine that statements questioning sincerity must have a rational basis. It is error to deny conscientious objector classification because of statements doubting sincerity which are without any factual support. *United States* v. *Close*, 215 F.2d 439 (7th Cir. 1954); *Annett* v. *United States*, 205 F.2d 689 (10th Cir. 1953). It is no less error to deny it on the basis of statements whose factual support is wholly irrational.

"Pharisaical criticism" of a registrant's lack of personal fastidiousness is no rational basis for denial of conscientious objector classification. *Parr* v. *United States*, *supra*, 272 F.2d at 420. "Were this not so, we imagine many persons of all denominations with sincere religious faith would

[11] The Ninth Circuit also held in *Parr* that a registrant who obtains assistance in preparing his conscientious objector form and does not report it as such on the form, because of the confusing instructions, has not done anything which "would have the slightest bearing on his honesty, sincerity or good faith as a conscientious objector." 272 F.2d at 422.

find the door to God's kingdom narrower than they thought." *United States* v. *Hesse*, 417 F.2d at 146.[18]

Certiorari should be granted so that this Court can rule on whether, in addition to meeting the requirement of the statute, a conscientious objector must be a saint, or whether it is sufficient that he be an ordinary man who is, by reason of religious training and belief, conscientiously opposed to participation in war in any form.[19]

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

MARVIN M. KARPATKIN
MICHAEL N. POLLET
KARPATKIN, OHRENSTEIN & KARPATKIN
1345 Avenue of the Americas
New York, New York 10019
Attorneys for Petitioner

May 1970.

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[18] The Eighth Circuit noted in *Hesse*, *id.*, n. 11:

"'Even the Apostle Paul taught the Churches of Corinth that faith should not stand in wisdom' 1 Cor. 2:5, and at Galatia, that faith is not found in obedience to church law, Gal. 3:12, or in works, Rom. 4:5."

[19] "To be a good church member does not necessarily entail being a saint. A mortal may occasionally weaken and still remain loyal to the tenets of his faith. A conscientious objector is not to be considered an outcast, susceptible of being convicted of a felony by any stray scintilla of evidence, indicating sporadic deviation from the principles and approved practices of his religion. We are all children of Eve." *Chernekoff* v. *United States*, *supra*, 219 F.2d at 724.

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 61-69—JANUARY 1970 TERM

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
—v.—
JERRY ALLEN PENNER,
Defendant-Appellant.

Appeal From the United States District Court For the Western District of Oklahoma (D.C. #CR-68-21)

JOHN C. MORAN, Oklahoma City, Oklahoma (Riley Brock, Oklahoma City, Oklahoma; and Frank Hensley, Guymon, Oklahoma, of Counsel, with him on the Brief), *for Appellant.*

GIVENS L. ADAMS, Assistant United States Attorney (William R. Burkett, United States Attorney, with him on the Brief), *for Appellee.*

Before:

MURRAH, *Chief Judge,*
BREITENSTEIN and SETH, *Circuit Judges.*

SETH, *Circuit Judge*:

The appellant was indicted and convicted of unlawfully failing to submit to induction into the Armed Forces of the United States in violation of 50 U.S.C. App. §462. Trial was had to the judge without a jury.

Appellant has taken this appeal asserting that his initial local board classification had no basis in fact and was arbitrarily made by reason of the board's policy of classifying Mennonites as 1-A-O without consideration being given to each individual case, and that this failure was of due process and "tainted" subsequent proceedings. He also asserts that the Presidential Appeals Board had no basis in fact for its reclassification of him as 1-A. We find no error in the procedures followed and find there was a basis in fact for appellant's ultimate classification, as did the trial court.

The scope of our review is, of course, limited as set forth in Estep v. United States, 327 U.S. 114; Witmer v. United States, 348 U.S. 375; United States v. Capson, 347 F.2d 959 (10th Cir.); Thompson v. United States, 380 F.2d 86 (10th Cir.); United States v. Martin, 416 F.2d 44 (10th Cir.).

The record shows that appellant is at least a third generation member of the Mennonite Brethren Church. He registered with his local draft board in 1964 and claimed a conscientious objector status. He was classified initially as 1-A-O, and later as II-S. He was reclassified as 1-A-O in 1965 and after a personal appearance on November 4, 1965, was denied a 1-O classification which he had requested. He then took an appeal to the State Appeals Board, and after a hearing held by a Department of Jus-

tice Hearing Officer under the procedure then in effect, he was classified 1-A-O by the State Board on January 7, 1967. The Director of Selective Service then took an appeal to the President, and the Presidential Appeals Board classified him as 1-A on June 21, 1967.

The Federal Bureau of Investigation made an investigation and its résumé was submitted to the State Appeals Board and was a part of the record going to the Presidential Board. This report contained a number of references to appellant's personal behavior while at Tabor College, Hillsboro, Kansas, which is a church school. These incidents were derogatory and constituted departures by him in his personal behavior from the Mennonite teachings. The appellant had the opportunity to contradict or to comment on this report at the hearing on his appeal to the State Appeals Board. He made some comments on the report, but did not deny the substance of it, and but few details. The résumé stated that while at Tabor College, the appellant on weekends would drink, date girls, and sometimes spend the night with them. Some, but not all, of the persons interviewed during the FBI investigation stated in effect that in their opinion appellant was not sincere in his religious beliefs. The hearing officer on the State Board appeal concluded that appellant's training and beliefs could not be so "devout" as to military service and be disregarded as to his personal conduct. The Justice Department's résumé however stated that the hearing officer was of the opinion that appellant was sincere with respect to his belief that under no circumstances could he violate God's law by killing another human being.

The State Appeals Board, on the basis of the registrant's file including the Justice Department résumé, the FBI

resume, and appellant's response to the FBI material, classified appellant as I-A-O. As indicated above, appeal was taken to the Presidential Appeals Board and upon the same record this Board classified appellant as I-A.

Appellant strongly urges, as he did before the trial court, that there was a lack of due process before the local board, and this tainted all the subsequent proceedings. This due process argument is based on the proposition that the Board automatically and without any consideration classified appellant as I-A-O and disregarded his I-O claim. See United States v. Tichenor, 683 F.2d [illegible] (9th Cir.). However, the record does not support the basis for the argument. The offer of proof of testimony of the secretary of the Board was to the effect that the majority of Mennonites were classified as I-A-O and that the State Board was better equipped on an appeal to make an investigation. This would not constitute a sufficient showing as to the treatment of appellant's claims had it been admitted. The facts shown do not bring this case within the decision of Quaid v. United States, 377 F.2d 23 (9th Cir.), where there was a total lack of consideration of the registrant's claim, nor within United States v. Martin, 441 F.2d 44 (9th Cir.), where there was clearly an issue as to the classification given by the local board and serious procedural confusion had arisen. There was a claim of prejudice to the Board but no showing was made and no question thereof on the appeal to the State Appeals Board.

The State Board as contemplated by the Act and the regulations conducted a de novo examination of appellant's claim and a hearing was had before a Department of Justice hearing officer at which appellant was permitted to appear, to testify and to submit any additional data. There

was also at the time in practice provision for a Justice Department report to the State Board. This was under the 1948 Act and prior to the new Selective Service Act of 1967 (Public Law 90-40).

The State Board classification constituted a new and separate classification. There are several decisions from other jurisdictions on the effect of classification at stages after "appeal" has been taken from the local board which are helpful here. The most critical one of these is United States v. Jaskwich, 261 F.2d 681 (7th Cir.), where it was asserted that the local board applied an erroneous rule by not allowing any members of a particular sect ministerial classification. The court held that the de novo nature of the consideration by the appeals board where it had the pertinent information before it would cure any such defect. See also Reed v. United States, 366 F.2d 710 (9th Cir.); United States v. Van Black, 367 F.2d 889 (2d Cir.); In Re Lemon v. United States, 367 F.2d 531 (9th Cir.). On this point the appellant urges that the cases of Reed v. United States, 361 F.2d 770 (9th Cir.), and United States v. Perkins, 387 F.2d 114 (4th Cir.), are to the contrary and should control. In Perkins there was a showing made at a time which the court found inconsistent with the appeal consideration, but we have no such facts here. Reed v. United States, supra, also is contrary to the position we take, but in this case we do not choose to follow it. See also Welsh v. United States, 371 F.2d 107 (9th Cir.). If there was any irregularity at the local board, it is not asserted there was any irregularity in the State Appeals Board proceedings.

Again, the file and reports and letters added before the State Board was considered by the Presidential Appeals

Board. This was merely a re-evaluation of the facts under the Act and the classification resulting therefrom was again a new separate one. There is no persuasive authority holding that a different conclusion cannot be reached upon the same record by the two different Boards if the basis in fact requirement is met. Thus the only remaining issue is whether there was a basis in fact for the final classification. As to this we agree with the trial court that there was, and this is demonstrated by the variety of facts, inferences, and opinions in the record relating to the sufficiency of appellant's beliefs as a conscientious objector. Sincerity must be the test, the data related to it, and it was applied. Berendsen v. United States, 201 F.2d 728 (10th Cir.); Salamy v. United States, 201 F.2d 828 (10th Cir.); Wigman v. United States, 201 F.2d 829 (10th Cir.); United States v. Martin, 201 F.2d 41 (10th Cir.).

The requirement of sincerity is an obvious one, but being subjective and as indicated in Berendsen v. United States, supra, and United States v. Martin, supra, is a difficult one to apply. There was a basis in fact contained in the summary in the F.B.I. resume of interviews with appellant's employers thereto, and in the Department of Justice resume. These contain a variety of facts, opinions, positions, and conclusions as to appellant's sincerity. These go from one extreme to the other, but the significant ones relate to appellant's personal conduct and its relation to his religious beliefs and his beliefs as a conscientious objector. This file thus contains sufficient factual material to support the Presidential Board's 1-A classification, and the basis in fact test has been met.

The appellant points out that several of the significant events referred to in the F.B.I. summary took place while

he was in Tabor College which was nearly four years before the Presidential Appeals Board and perhaps he had since changed his ways. Some of the other incidents also took place some time ago. However, as indicated above, the appellant had the opportunity to demonstrate a change in his ways before the State Board and to furnish additional data and information on this point.

AFFIRMED.

Department of Justice Advisory Recommendation

[Stamp—Selective Service System, Local Board No. 4, Jan 11 1967, 121 Douglas Ave., Beaver, Oklahoma]

[Stamp—Received—Appeal Board, Western Federal Judicial District, Dec 6 1966, Selective Service System, Oklahoma City, Oklahoma]

UNITED STATES DEPARTMENT OF JUSTICE

Washington, D. C.

(Emblem)

Address Reply to the
Division Indicated
and Refer to Initials and Number

Dec 1 1966

Chairman, Appeal Board
Western District of Oklahoma
Selective Service System
P. O. Box 14837
Oklahoma City, Oklahoma 73114

Re: Jerry Allen Penner
Conscientious Objector

Dear Sir:

As required by Section 6(j) of the Universal Military Training and Service Act, as amended, an inquiry was made by the Department of Justice in the captioned matter and an opportunity to be heard on his claim for exemption as a conscientious objector was given to the registrant by Mr. Cleo Fitzgerald, a Hearing Officer for the Department of Justice.

The information obtained from the inquiry and considered by the Department of Justice in arriving at its recommendation is contained in the Resume of the Inquiry attached hereto and made a part hereof.

Registrant was born November 18, 1945, in Staunton, Virginia, while his father was performing conscientious objector work at a hospital there. He and his parents are members of the Mennonite Brethren Church and he was baptized July 28, 1957. He graduated from Balko High School in Balko, Oklahoma in 1963. He attended Tabor College in Hillsboro, Kansas, during the 1963-1964 school year. He was on both academic and disciplinary probation at the end of the year. He started an electronics course at Rocky Mountain College in Denver, Colorado, in 1964 but withdrew in February or March 1965. He now works on his father's farm in Balko, Oklahoma.

His SSS Form 100 was received by his local board on January 27, 1964, and he indicated he is a conscientious objector. His SSS Form 150 was received February 7, 1964, and he indicated opposition to both combatant and non-combatant training and service. He was classified 1-A-O on November 4, 1965, and has appealed.

Registrant appeared before a Department of Justice Hearing Officer in Stillwater, Oklahoma, on May 21, 1966, accompanied by his father. He indicated he is now working on his father's farm but would like to complete his college education. He advised that he had read the Resume of the Inquiry and had no objection to it except for the reference on page 7 to his having been jailed in Perryton, Texas. He said he had never been in trouble in Perryton. He acknowledged that the reports on pages 2 through 5 relating to drinking, carousing and illicit relations with

women were correct. He also admitted that his conscientious objector form was filled out by the Dean of Men at Tabor College, as suggested on page 4 of the Resume.

He is a member of the Mennonite Brethren Church in Balko, Oklahoma, which is not as strict in its requirements as other Mennonite churches. For example, beards are not required and radio and television are permitted. Members who enter military service are not "churched out" although the church's official policy is non-resistance. Registrant's father and mother have belonged to the Mennonite Brethren Church for many years and the father was a conscientious objector in World War II.

Registrant was unable to explain his church's affiliation with other Mennonite groups. He answered questions regarding practices and liturgy in a general way but apparently had no overall conception of the teachings and practices of his church. He did discuss some specific teachings and, in the opinion of the Hearing Officer, was sincere with respect to his belief that under no circumstances could he violate God's law by killing another human being. Registrant stated that war is against the will of God and this country's defense program should be abolished.

Registrant advised he believes in the use of restraining force in self defense and sees no objection to calling civil authorities for defense. At the same time, he would never expect anyone to use force to the extent of killing a person. He makes no distinction between aggressive or defensive force, however, as far as the military is concerned. He does not believe wars are necessary to insure the freedoms and liberties we have in this country. He believes Russia is an ungodly country but does not believe the United States should resist if Russia attempted to take over this country.

However, he indicated some form of resistance would be justified if someone tried to take over his father's farm.

He stated that he was claiming conscientious objection on his own even though it is expected of him by the leaders of his church and he was advised to do so by his parents. He advised that he has seen the error of the kind of life he led in college and he no longer behaves that way. He indicated he would be willing to treat a wounded soldier, work in hospitals or do other service work as a civilian but not as a member of the military. He advised he would not work in a plant having defense contracts.

The Hearing Officer noted that during the time registrant was away from home he was able to adhere to some of the strictest teachings of his church and his parents without any apparent difficulty as far as his conscience was concerned. He opined that the remorse registrant now expresses regarding his conduct is probably more because of the fact that his parents learned of his behavior than any real regret as to his conduct. He concluded that registrant's religious training and belief could not be so devout and absolute as to military service and yet be disregarded with respect to personal conduct. The Hearing Officer thought registrant's conscience might be bothered if placed in a combat unit, but also noted that his views might change if associated with other young men in the military away from his parents.

The Hearing Officer observed that registrant's behavior has been such that it appears his religious training and belief are "not of a very lasting and sincere impression." He found registrant generally frank and honest but was not convinced that registrant had permanently ceased smoking, drinking and running around. The Hearing Officer expressed some uncertainty as to the sincerity of registrant's

objection to combatant training and service but noted that he was born in a conscientious objector camp, was reared in these beliefs, and was classified 1-A-O by his local board. He commented that registrant's comments on the taking of lives and the policy of nonresistance were "shallow" and noted that his SSS Form 150 was answered by the Dean of Men at Tabor College; not by the registrant. He opined that registrant would be "a little upset" if ordered into noncombatant service but thought he would accept such service rather than go to jail. He concluded that registrant's objection to noncombatant service is not sincere and recommended that his claim be sustained as to combatant training and service only.

The Department of Justice finds that the registrant's conscientious objector claim is sustained as to combatant military training and service only and recommends that he be classified in Class 1-A-O.

The Selective Service Cover Sheet in the above case is returned herewith.

Sincerely,

/s/ T. Oscar Smith

T. Oscar Smith, Chief

Conscientious Objector Section

In the Supreme Court of the United States

OCTOBER TERM, 1969

JERRY ALLEN PENNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a non-jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted for failing to submit for induction into the Armed Forces, in violation of 50 U.S.C. App. 462. On November 8, 1968, he was sentenced to imprisonment for five years, subject to parole as determined by the Board of Parole. The court of appeals affirmed (420 F. 2d 344; Pet. App. 1–7).

Petitioner's Selective Service file [1] shows that when he registered with Local Board 4, Beaver County,

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[1] The Selective Service file is contained in the record filed with the Clerk of this Court. Citations of record are to the trial transcript ("Tr."), designated as Volume IV of the record.

389-152—70

Oklahoma, he claimed, as a member of the Mennonite Brethren Church, to be a conscientious objector to war in any form. While a student at a college operated by the Mennonites—Tabor College in Hillsboro, Kansas—he executed an SSS Form 150 claiming C.O. status, and returned it to his draft board. He was classified I–A–O—*i.e.*, available for non-combatant service. He did not object at that time to this classification, but obtained a student deferment. On October 14, 1965, after his student deferment had expired, petitioner was again classified I–A–O. He requested and received a personal appearance, at which time he stated that he had nothing further to submit beyond the statements in his previously filed form. He maintained that he was entitled to a I–O classification, but the board retained petitioner in I–A–O.[2]

Petitioner appealed to the state appeal board, and following the procedure then in effect, his case was submitted to the Department of Justice for investigation and recommendation. An FBI investigation was made, and a résumé thereof was sent to petitioner. The résumé contained responses from approximately 30 sources, including officials of schools attended by petitioner, classmates, relatives, friends, neighbors, and co-religionists. Some of the persons interviewed said that petitioner had not been a strict observer of his faith, that he smoked, drank alcoholic

[2] Petitioner's offer of proof through the clerk of the board (Tr. 16–18; see Pet. 12–14) was to the effect that a majority of Mennonites were classified I–A–O. The clerk also indicated that the local board thought that more facilities to make the determination were available to the appeal board.

beverages, did not attend church regularly, and, as described by a college classmate, had been "carousing around" with girls. Also contained in the report were statements by classmates that Tabor College encouraged students to fill out conscientious objector forms, but that this was generally regarded as a "big joke"; that when petitioner executed his form, he so treated it and expressly told a roommate that he was not sincere in so doing (Tr. 90). A neighbor suggested that petitioner had made the C.O. claim at the direction of his father—who had done the same thing during World War II—and his uncle. There were strong differences of opinion on the question whether petitioner was sincere in his claim of conscientious objection; relatives and co-religionists believed that he was, but college classmates disagreed.

After a personal interview with petitioner, the Department of Justice hearing officer submitted his written opinion, stating that, in their discussion, petitioner had acknowledged the correctness of the reports of his personal habits, and that he appeared to have no broad conception of the teachings and practices of his church. Petitioner admitted that his C.O. form had been filled out by the dean of men at Tabor College. The officer felt that petitioner's remorse concerning his past personal conduct was founded more upon the fact that his parents had learned of his behavior than a real attempt to be devout. The officer was not convinced that petitioner was sincere in his claim to conscientious objection but concluded, in view of the entire background, that he should be classified I–A–O (Pet. App. 8–12).

On January 7, 1967, the state appeal board classified petitioner I–A–O by a unanimous vote. Because of the unanimity, petitioner had no authority to file an appeal. However, on March 15, 1967, the National Director of Selective Service filed an appeal with the President. On June 21, 1967, the national appeal board classified petitioner as I–A. One month later, he received a notice of induction. On August 2, 1967, petitioner reported to the induction station, but refused to submit.

In the ensuing criminal prosecution, the district court found petitioner guilty (Tr. 150–160). The court reviewed the entire factual setting, from petitioner's initial registration to his refusal to report for induction. It found that there was a basis in fact for the last classification, particularly in light of the materials contained in the FBI résumé which petitioner had an opportunity to challenge but, for the most part, did not. The court felt that petitioner's religious training and belief could not have been so devout and absolute as to military service and yet so disregarded in his personal conduct. The court also took note of the fact that, when asked to cite instances when he publicly declared his views toward military service, petitioner had listed only one occasion in 1957, and then recent group discussions with friends. The court observed that petitioner was but twelve years old in 1957, and that his claim of discussions with friends had not been borne out (Tr. 154). The court concluded that the burden was upon the registrant to bring himself within the exempted class; that whether or not the board had made an erroneous classification,

any error would be cured by the *de novo* review of the final classification board since all the pertinent information was before it; and that the contradictions in the record provided a basis in fact for determining that petitioner's I–O claim was not sincere. The court of appeals also found that any error by the local board was cured by the review procedure on appeal, and that there was basis in fact for the I–A classification by the presidential appeal board (Pet. App. 1–7).

DISCUSSION

Petitioner argues (Pet. 19) that the local board acted on the basis of a blanket characterization of Mennonites as falling in class I–A–O, and that this was error which could not be cured on appeal, no matter how extensive the investigation and hearing. The logic of this position would be to render the whole appeal procedure useless in any case where the appeal board on its own reached the same conclusion as the local board. There is no sound reason for such a result. The administrative appeal procedure was set up for the precise purpose of curing mistakes by local boards. It is therefore evident that the mere fact that a local board may have made an error is not a basis for ruling that an ultimate classification on appeal is improper.

There are, to be sure, some errors at the local board level which so taint the whole appellate process that the courts have held that the defect is not cured by appellate review. An example of such an error would be a case where the local board did not allow a registrant to make a

full record on which the appeal boards could act. See *United States* v. *Fry*, 203 F. 2d 638 (C.A. 2). So also, where the local board never passed on the claim, as required, but merely acted as a conduit in sending the file to the appeal board, it has been held that a registrant had been deprived of a substantive procedural right. *Knox* v. *United States*, 200 F. 2d 398 (C.A. 9). On the other hand, where the defect does not affect the substantial rights of the registrant and does not taint the appellate record, the courts have generally held that the error is cured by *de novo* review incident to an administrative appeal. *United States* v. *Corliss*, 280 F. 2d 808, 816–817 (C.A. 2); *Mintz* v. *Howlett*, 207 F. 2d 758 (C.A. 2). While inconsistencies do exist, there is no such basic conflict among the circuits as petitioner claims. There is, in short, no absolute doctrine of "appellate cure" or non-cure. The issue is essentially a pragmatic, factual one as to whether the error at the local board level survives sufficiently to taint the appellate process.

In this case, there is no basis for supposing that any error at the local board level infected the appellate process. In the first place, it is not at all clear that there was any error committed. Petitioner's offer of proof showed only that a I–A–O classification was given to a majority of Mennonites. This does not show lack of consideration of individual cases even if it be assumed that the board was unduly strict in this regard. In any event, it is clear that the action of the local board was not the decisive factor in the subse-

quent review of petitioner's case. The hearing officer, on the basis of the FBI investigation and his hearing, was doubtful of the sincerity of the registrant's claim to any exemption and was influenced by the local board only to the extent of recommending a I–A–O rather than a I–A classification (Pet. App. 11–12). He specifically found, on the basis of the reports and the hearing, that petitioner's "objection to noncombatant service is not sincere" (Pet. App. 12). The state appeal board and the presidential appeal board had before them the FBI résumé and the recommendation of the Department of Justice. They were unaware of the reasons for the local board action. Clearly, therefore, if the local board was in error, the error did not taint the appellate review.

On the basis of the record before it, which included the FBI résumé and the recommendation of the Department of Justice, the presidential appeal board classified petitioner I–A rather than I–A–O. This action, as the courts below held, was within the power of the board to classify *de novo*. As noted above, the letter from the Department of Justice showed that the hearing officer had doubts as to the sincerity of petitioner's C.O. claim. This stemmed not only from the fact that the reports showed that petitioner's conduct deviated from Mennonite beliefs, but because the reports and interview could be taken to indicate that petitioner did not take seriously the Mennonite objection to war. The Department of Justice hearing officer resolved these doubts in petitioner's favor largely because of his Mennonite upbringing. The fact that the presidential appeal board

resolved this borderline case the other way does not necessarily show a lack of basis in fact.

In this case, the wheels of government have ground at many levels, and have ground exceeding fine. As indicated in the discussion above, the result may be sustained by an application of the "any basis in fact" and the "*de novo* review" doctrines, as was done by the court of appeals below. Yet, this leaves a nagging doubt that the wrong result has been reached.

While not dispositive, it is relevant that this case involves a third-generation Mennonite, who was himself born in a public service camp in Virginia where his father and mother were residing because of his father's conscientious objection in World War II.

Until the last moment, no one thought that petitioner should be classified I–A. His local board classified him I–A–O—eligible for non-combatant service. He took an appeal to the state board, seeking to be classified I–O. Under the prevailing procedure, he was interviewed by a Department of Justice hearing officer. It was at this point that summaries of FBI reports got into the file, which indicated that, in his personal conduct, petitioner was not always as good as he might be, or as the tenets of his religion would require. Petitioner conceded as much, but would not yield in his objection to killing in war. The hearing officer recommended that he be classified I–A–O, and this was approved by the Department of Justice, and so reported to the state board. The state board continued the I–A–O classification.

At this point, petitioner had no further right of appeal, since the state board was unanimous. However, the Director of Selective Service took an appeal to the national board. This is sometimes called the presidential board, although it has, in fact, no contact with the President. When the Director of Selective Service takes an appeal to the national board, he simply notes that fact, without stating reasons, and the file is then transmitted, seriatim, to the three members of the national board, who reside in different cities, and ordinarily do not meet. There may be some reason for thinking that the purpose of the Director of Selective Service in taking an appeal in this case was that petitioner should be classified I–O, in view of his membership in the Mennonite Church. In accordance with practice, petitioner had no hearing before the national board, and that board stated no reasons. The board classified him as I–A. That is the only point in the whole procedure where anyone thought that a I–A classification was appropriate. From this, there is no appeal, except to the courts. Yet, the only hearing that petitioner had was before the local board, and before the hearing officer of the Department of Justice. In both of those cases, he was found to be sincere in his opposition to killing, and he was found to qualify for a I–A–O classification.

It is a difficult matter to deal with, and to classify, millions of persons, and there must obviously be considerable informality in the system. There must also be support for the persons who undertake this difficult

task. That is the appropriate foundation for the "any basis in fact" rule, established by this Court in *Estep* v. *United States,* 327 U.S. 114, and followed by the court below. In most cases, that is the appropriate rule for the review of difficult factual determinations. Yet, it is important that the courts not get themselves into the situation which tied the hands of the Massachusetts courts in the *Sacco-Vanzetti* case, where procedural rules made it impossible for the reviewing court even to consider the question whether justice was being done.

If the question here were whether petitioner should have been classified I–A–O, or, on the other hand, I–O, the problem would be a close one, and the procedural rule adopted by the court below would be hard to fault. In this case, however, petitioner has been classified I–A, after a series of procedural steps in which the issue was never whether he should be I–A until the final step, which occurred in a remote board before which he filed no papers and had no hearing. Although military service is clearly not a punishment, there is something here a little akin to the situation which this Court resolved in *Price* v. *Georgia,* No. 269, this Term, decided June 15, 1970. It is difficult to see how the national board was justified, under all the circumstances, in increasing petitioner's classification, without any additional facts being put before it, and apparently with no warning to petitioner that he might be classified I–A. The only problem he knew to be in the case was whether he should be I–A–O, or I–O.

It is the fact that petitioner was born into one of the historic peace churches, and has not left it. True, his conduct has not always been exemplary. It is likewise true that such misconduct could indicate a general lack of sincerity. But much of the evidence of misconduct here—in the vague form of summaries of FBI reports with respect to events several years earlier—does not necessarily impugn the sincerity of his views against killing in war.

If this is the proper evaluation of the situation, then procedural rules, even ordinarily salutary ones, like the "any basis in fact" and the "*de novo* review" doctrines, should not prevent the courts from reaching as accurate a result as is possible in human affairs.

Under this approach, the I–A classification was not warranted, and the order to report for induction is invalid. See Motion to Vacate the Judgment and Dismiss the Indictment in *Petite* v. *United States*, No. 45, 1959 Term, as to the Court's power to vacate a judgment of conviction on the government's motion without reaching the merits.

Accordingly, the petition for certiorari should be granted, the judgment of the court of appeals should be reversed, and the case should be remanded to the district court with instructions to dismiss the indictment.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970